

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANTOLIN ANDREW MARKS,

Plaintiff,

v.

DEENA GEPHARDT *et al.*,

Defendants.

Case No. C07-5259RJB/JKA

REPORT AND
RECOMMENDATION

**NOTED FOR:
April 4, 2008**

This 42 U.S.C. § 1983/Bivens action has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 (b) and local Rules MJR 3 and 4. Plaintiff has filed a motion asking the court to dismiss this action against all defendants (Dkt # 55). Normally this would be a dismissal under Fed. R. Civ. P. 41 (a)(1), however, in this case there was a counter claim and defendants have filed an answer. Thus, the court must consider this dismissal under Fe. R. Civ. P. 41 (a)(2).

DISCUSSION

The counter claim in this action has been dismissed and presents no impediment to dismissal. Fed. R. Civ. P. 41 (a) (2) allows a court to dismiss an action on terms and conditions the court

1 deems proper. Here, plaintiff indicates he does not want to proceed against the defendants and in
2 particular, he does not want to proceed against defendant Farabaugh. Plaintiff indicates Dr.
3 Farabaugh has been trying to properly treat him and plaintiff's conditions have improved. This
4 includes his skin condition and diet.

5 This action proceeded for nearly nine months. The parties have both filed a number of
6 motions including motions to dismiss and counterclaims. The court does not believe terms or
7 conditions are warranted except that the action should not be subject to re-filing. Thus, the dismissal
8 should be **WITH PREJUDICE**.

9 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,
10 the parties shall have ten (10) days from service of this Report to file written objections. *See also*
11 Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of
12 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule
13 72(b), the clerk is directed to set the matter for consideration on **April 4, 2008**, as noted in the
14 caption.

15 DATED this 11 day of March, 2008.
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17 /S/ J. Kelley Arnold
18 J. Kelley Arnold
19 United States Magistrate
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